SUPREME COURT, U.S.
NOV 15 1957
JOHN T. FEY, Clerk

No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

PUBLIC SERVICE COMMISSION OF UTAH AND UTAH CITIZENS RATE ASSOCIATION, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court (R. 39–49) and the dissenting opinion of District Judge Christenson (R. 50–65) are reported in 146 F. Supp. 803.

JURISDICTION

The final judgment of the district court was entered on June 13, 1956 (R. 73), and notice of appeal was filed on July 10, 1956 (R. 75). Probable jurisdiction was noted on November 5, 1956. 352 U. S. 888. The

jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Whether there is substantial evidentiary support for the Commission's finding that the Utah intrastate freight rates were below the rates on corresponding interstate traffic, and for its finding that conditions incident to intrastate transportation of freight in Utah were not more favorable than those incident to interstate transportation between Utah and adjoining states.

2. Whether appellants' attack upon the validity of the Commission's order, entered in an earlier and different proceeding, authorizing increased interstate rates is barred by the rule that orders of the Interstate Commerce Commission may not be collaterally attacked.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 27–29.

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission, issued under Section 13 (4) of the Interstate Commerce Act, which required the railroads operating in Utah to establish, with certain exceptions, Utah intrastate freight rates reflecting the increases on corresponding interstate traffic to, from and between Utah points authorized by the Commission in proceedings designated *Ex parte No. 175*. Appellants attack the Commission's order principally upon the ground that there is no substan-

tial evidence to support the Commission's findings. They do not challenge the adequacy of the findings to support the order.

Ex parte 175 was a proceeding instituted before the Commission in March 1951 by most of the nation's railroads seeking a general increase in interstate freight rates. The Commission initially authorized a 2% increase in basic freight rates in western territory, and on further hearings substituted, first, a 6% increase, and, later, a 15% increase.[1] The final authorization, granted in April 1952, was to remain in effect until February 28, 1954, but was later extended to December 31, 1955, and, prior to that date, all time limitation was removed.[2]

The Commission found that these rate increases would yield additional revenue required by the railroads in order to maintain a national transportation system adequate to the needs of commerce, the postal system, and the national defense. The Commission found that the railroads needed more revenue because of sharply higher operating costs resulting from substantial wage increases (281 I. C. C. at 566–568; 284 I. C. C. at 595; 297 I. C. C. at 27), higher corporate tax rates (284 I. C. C. at 597), and increased costs for fuel, material and supplies (280 I. C. C. at 185; 281 I. C. C. at 568; 297 I. C. C. at 27). Moreover, there had been a decline in railway net ratio, and in net and cash working capital (284 I. C. C. at 624), a decrease in over-all rates of return (*id.* at 607, 612), and a cur-

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[1] 280 I. C. C. 179, 189; 281 I. C. C. 557, 639; 284 I. C. C. 589, 661–662.

[2] 284 I. C. C. 589, 666; 289 I. C. C. 395; 297 I. C. C. 17, 51.

tailment of maintenance due to reduced income (297 I. C. C. at 27–28).

Since the freight rate increases were grounded upon basic revenue needs, the Commission, as its reports show, considered and acted upon the railroads' over-all financial condition and upon the revenues, expenses and net income of their total operations, both interstate and intrastate. In extending the expiration date of the *Ex parte 175* increase, the Commission noted that all except three states (Arizona, Idaho, and Utah) had authorized either wholly or in large part increased intrastate rates corresponding to the increased interstate rates authorized in *Ex parte 175* (289 I. C. C. at 396, 441–444).

The railroads operating in Utah initiated three proceedings before the Public Service Commission of Utah (Utah Commission) seeking intrastate rate increases equal to those authorized for interstate traffic in the *Ex parte 175* proceeding. After the Utah Commission had refused to grant any part of the requested increases,[3] the Interstate Commerce Commission undertook, on the carriers' application, a Section 13 investigation of Utah intrastate rates. On the basis of the testimony (R. 138–417) and documentary evidence (R. 419–748) received at the hearing, the examiner filed a proposed report recommending that the Commission

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[3] The Utah Commission had previously failed to grant intrastate rate increases corresponding to the *Ex parte 162*, *166*, and *168* interstate increases, and granted them effective May 1, 1953 (over six years after the first *Ex parte 162* increase, 264 I. C. C. 695, 745) only after the Interstate Commerce Commission had ordered the carriers involved to put into effect such intrastate increases (R. 96–97).

find that the existing Utah intrastate rates cause unjust discrimination against interstate commerce (R. 4). Following oral argument, the full Commission found that these rates unduly discriminate against interstate commerce (R. 95, 118).

The Commission's report, which occupies 25 pages of the printed record (R. 95–120), shows that the net property investment of the railroads serving Utah has risen, while their rate of return on net investment has been declining; that in 1952 the revenue per ton-mile on all traffic (interstate and intrastate) in Utah was less than in the mountain-Pacific states, less than in the western district, and less than in the entire United States; and that the estimated additional annual revenue which would be received under the proposed increased intrastate rates was approximately $1,880,000 (R. 98, 99, 117). Comparative intrastate and interstate rates for the principal commodities transported by rail in Utah are set forth (R. 100–113).[4] The report also discusses and evaluates the evidence introduced by appellants designed to show that in Utah operating conditions in intrastate traffic are more favorable than in interstate traffic (R. 114–117).

Based on its consideration of the entire evidence, the Commission found, *inter alia* (R. 118–119): Conditions incident to intrastate freight transportation are not more favorable than those incident to interstate transportation between Utah and adjoining

[4] The commodities dealt with are coal, coke, iron ore, manufactured iron and steel, lead and zinc ores, uranium and vanadium ores, waste materials, clay and bentonite, sand and gravel, lime rock, fuel oil, gasoline, cement, sugar, wheat, animal and poultry feed, sheep and goats, and cattle.

states. Present Utah intrastate rates (except on sugar beets and beet-sugar molasses destined to sugar factories, and certain specified rates on coal, sheep and cattle) are "abnormally low" and do not contribute their "fair share" to the revenues required by the carriers to enable them to render adequate and efficient service, and to develop and preserve a national transportation system adequate to meet the needs of commerce, the postal service, and national defense. These intrastate rates cause, and for the future will cause, "unjust discrimination against interstate commerce." Such discrimination should be removed by applying to intrastate rates "the same respective increases" authorized for interstate commerce in *Ex parte 175*.

The Commission excluded from the authorized increase any increase which would make the intrastate rate higher than the corresponding interstate rate for a like distance (R. 119), and the Commission expressly stated that its findings relate to Utah intrastate rates "generally" and are without prejudice to re-examination of the lawfulness of any "particular" rate (R. 120). An order giving effect to the findings was entered on February 8, 1956 (R. 130–132), and appellants promptly instituted the present suit to have the order set aside.[5]

The court in its decision upholding the order recognized that intrastate rates are "primarily the concern of the state" (R. 45) and that mere rate disparity "is not enough to warrant interference by the Inter-

[5] A temporary restraining order issued by a single district judge enjoined enforcement of the order until determination of the cause by the three-judge district court (R. 28–32).

state Commerce Commission" (R. 46). The court held that the finding that existing Utah intrastate rates unduly burden and discriminate against interstate commerce was not grounded solely on disparity between these rates and interstate rates, but was additionally grounded on the showing that "the conditions under which interstate and intrastate traffic move were substantially the same with respect to all factors bearing on the reasonableness of the rates" (R. 46). The court, after discussing the facts and certain applicable judicial decisions, said (R. 49): "We have considered the voluminous record and conclude that the findings of the Commission are supported by substantial evidence."

The court also rejected plaintiffs' contention that the "flat percentage increase" of interstate rates in *Ex parte 175* was unlawful. The court pointed out that the validity of that order is not subject to collateral attack and that various decisions of this Court had upheld the validity of like orders (R. 48–49).

SUMMARY OF ARGUMENT

I

A. The Interstate Commerce Act as amended in 1920 makes it the duty of the Interstate Commerce Commission to administer the Act to the end of developing a national transportation system adequate to the country's needs, and to consider, when determining the reasonableness of rates, the railroads' need for revenues sufficient to enable them to provide adequate and efficient service. To complement these provisions, Congress, by enactment of Section 13 (4), gave the

Commission authority to adjust upwards intrastate rates which do not make their fair contribution to the railroads' over-all revenue needs and thereby unjustly discriminate against interstate commerce. This Court has consistently held that Section 13 (4) should not be interpreted as imposing upon the Commission requirements respecting findings and evidence so exacting as to prevent or unreasonably delay prompt and effective administration of the section.

B. Appellants attack the Commission's order increasing Utah intrastate rates upon the ground that two of the Commission's findings are not supported by substantial evidence. The first such finding, that existing intrastate rates are abnormally low and fail to contribute their fair share of the railroads' revenue needs, has the support of the evidence upon which the Commission based its findings that various intrastate rates (involving commodities constituting a major part of Utah freight transportation) were materially lower than the corresponding interstate rates for like distances. It has the support of other examples of rate disparities shown by the evidence, and the evidence that some of the rate disparities had an adverse competitive effect on interstate shippers and shipments. We submit that evidence of this scope and character provides sufficient support for the Commission's determination, made in the exercise of an informed judgment as to rate making and rate comparisons, that the level of intrastate rates was sufficiently below the level of corresponding interstate rates to throw upon interstate commerce an undue share of the burden of meeting the railroads' revenue

needs. And the Commission provided safeguards against any unwarranted increase in individual intrastate freight rates. It provided that the corresponding interstate rate should be the ceiling for any increased intrastate rate, and it left open the door to re-examination of the lawfulness of any intrastate rate increased by its order.

C. The Commission's finding that the conditions governing intrastate transportation were not more favorable than those governing interstate transportation has the support of evidence that goods moving intrastate and those moving interstate are handled in precisely the same manner and are intermingled on the same trains. Such evidence does not lose its probative force by reason of the circumstance that, in railroad operations generally, there is essential unity between intrastate and interstate transportation—in the equipment and manpower employed and in other transportation-cost factors. The substance of appellants' attack upon the Commission's finding is, we submit, not that the finding lacks evidentiary support, but that the Commission did not give controlling weight to evidence presented by appellants designed to show that transportation costs are lower on intrastate freight than on interstate freight. The Commission considered this evidence and stated the grounds for concluding that it was not persuasive. Furthermore, appellants' evidence was speculative and inconclusive as to the ultimate fact for which it was offered.

II

Appellants contend that the order of the Commission authorizing increased interstate rates, entered in the prior *Ex parte 175* proceeding, is invalid. In the present Section 13 (4) proceeding appellants may not rely upon alleged invalidity of the *Ex parte 175* order because orders of the Interstate Commerce Commission may not be collaterally attacked. In addition, the asserted grounds of invalidity are without merit.

ARGUMENT

I

THE COMMISSION'S FINDING THAT THE UTAH INTRASTATE RATES UNDULY DISCRIMINATED AGAINST INTERSTATE COMMERCE IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. THE APPLICABLE STATUTORY PROVISIONS AND THEIR PURPOSES, AS RELATED TO APPELLANTS' ATTACK ON THE SUFFICIENCY OF THE EVIDENCE

Section 15a of the Interstate Commerce Act (*infra*, p. 29) requires the Commission, in determining reasonable rates, to give due consideration to the need of the railroads for revenues sufficient to enable them to provide adequate and efficient rail service. The National Transportation Policy embodied in the Act (*infra*, p. 27) directs the Commission to administer its provisions to the end of developing a national transportation system adequate to meet the needs of national commerce, the postal system, and national defense. Subsections (3) and (4) of Section 13 which, like Section 15a, were added to the Act by the Transportation Act, 1920, gave to the Commission the limited power to alter intrastate rates which unjustly discrim-

inate against commerce, in recognition of the fact that the revenue needs of the railroads relate to and are the product of their entire operations, intrastate as well as interstate.

In the first case under Section 13 (4) to come before this Court it declared that there is a "dovetail relation" between the purpose of Section 15a and the prohibition in Section 13 (4) of intrastate rates which unjustly discriminate against interstate commerce. *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586. This is so because, in securing for the railroads revenues which will enable them to maintain a transportation system adequate to the country's needs, "the lower the intrastate rates, the higher the interstate rates may have to be", thus casting on interstate commerce an undue proportion of the burden of providing the railroads' requisite revenues (*ibid.*). The Court said (*id.*, 585–586):

> Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. * * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.

The Court also held that authorizing the Commission to increase intrastate rates which do not contribute their fair share of the railroads' revenue needs is a constitutional exercise of the commerce power of Congress "in view of the blending of both [intrastate and interstate traffic] in actual operation." *Id.*, 588. "The same rails and the same cars carry both. The

same men conduct them. Commerce is a unit and does not regard state lines * * *." *Ibid.*

Appellants do not question these basic propositions, from which the Court has never departed, but question the sufficiency of the evidence to support the ultimate finding that existing Utah intrastate rates discriminate against interstate commerce. This attack, we submit, must be measured against the necessarily national scope of revenue proceedings such as *Ex parte 175*, and the Commission's duty to implement such a proceeding by a Section 13 (4) proceeding if intrastate traffic, not differing in its operating conditions from interstate traffic, is being transported at rates lower than those applied to interstate commerce. Our position is that there is substantial evidence in support of the Commission's basic findings, that proof is not required as to every factor or element that may be relevant to these findings, and that appellants are really demanding that the Commission be held to a degree of proof so exacting as to stultify effective administrative action.

In this connection, we deem it significant that this Court has rejected any interpretation of Section 15a or Section 13 (4) which would require findings by the Commission entailing administrative tasks so difficult and long drawn out as to defeat the statutory objective. In *Wisconsin Railroad Commission, supra*, the Court rejected the contention that the fair return contemplated by Section 15a was on the property used in interstate commerce segregated from that used in intrastate commerce. It said (p. 588) that to impose on the Commission this duty, "and to do this in a rea-

sonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it."

In *United States* v. *Louisiana*, 290 U. S. 70, 75–76, this Court declined to construe Section 15a as authorizing a rate increase thereunder only if the Commission has determined that the authorized increase is reasonable as to each individual rate subject to the increase. The construction was rejected because it would mean that "the administrative arm of the Commission [would be] paralyzed." The Court also held (pp. 78–79) that in a proceeding under Section 13 (4) the Commission need not determine that each individual intrastate rate, as increased by its order, is just and reasonable. Such a requirement would "similarly prevent" effective enforcement of the section.

In *Florida* v. *United States*, 292 U. S. 1, another Section 13 (4) proceeding, the Court said (p. 9) that the requirement of essential findings as to revenues "did not demand an impractical exactness", and that losses through inadequate rates could properly be determined although proof was lacking "of the precise extent of such losses."

B. THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE EXISTING UTAH INTRASTATE RATES WERE BELOW THE LEVEL OF CORRESPONDING INTERSTATE RATES, AND FAILED TO CONTRIBUTE THEIR FAIR SHARE OF THE RAILROADS' REVENUE NEEDS

The circumstances under which the Commission may validly require an increase in intrastate rates in order to remove unjust discrimination against interstate

commerce are (1) that existing intrastate rates are below the level of interstate rates, do not contribute their fair share of the railroads' revenue needs, and cause unjust discrimination against interstate commerce; (2) that transportation conditions for intrastate commerce are no more favorable than for interstate commerce; (3) that the increase in intrastate rates ordered by the Commission will yield substantial additional revenue; and (4) that intrastate rates, so increased, will be reasonable and remove the existing unjust discrimination against interstate commerce. *King* v. *United States*, 344 U. S. 254, 267–276. Appellants concede that the Commission made adequate findings with respect to each of these factors. They urge lack of evidentiary support only as to the findings that Utah intrastate rates, prior to the increase ordered by the Commission, were below the level of interstate rates, and that transportation conditions for intrastate commerce were no more favorable than for interstate commerce.

At this point, we consider the sufficiency of the evidence to support the finding that the Utah intrastate rates imposed by state authority are materially below the corresponding interstate rates which were authorized by the Commission in *Ex parte 175* in order to effectuate the objectives of Section 15a. of the Act and the National Transportation Policy.

The Commission's report refers to various examples of interstate rates which are materially higher than the intrastate rates applicable to shipments of like distances. The examples cover shipments of coal (R. 101, 103), coke (R. 104), clay and bentonite (R. 108–

109), sand and gravel (R. 109), lime rock (R. 109), cement (R. 110), sheep and goats (R. 112), and cattle and calves (R. 113). Additional detail appears in the record. Thus, an exhibit setting forth rates on coke (in cents per net ton) shows that the interstate rate from Salt Lake City to Whitney, Idaho (133 miles), is 375, while the intrastate rate from the same origin to Lewiston, Utah (126 miles) is 286; and that the interstate rate from Ironton, Utah, to Whitney, Idaho (183 miles) is 375, while the intrastate rate from the same point to Lewiston (176 miles) is 313 (R. 531). The report of the Commission also sets forth certain rates on coal in cents per net ton, and shows the following rate disparities for shipments of like distance: interstate 386, intrastate 346; interstate 605, intrastate 555; interstate 400, intrastate 308 (R. 100–101).

The rate disparity disclosed as to coal and coke is particularly significant. The evidence shows that failure to apply the *Ex parte 175* increases to Utah intrastate traffic was estimated to cause an annual revenue loss of about $1,860,000, and that about $575,000 of this amount, or nearly one-third, was estimated to result from low intrastate rates on coal, and over $1,500,000, or more than 80% of the total, was attributed to low intrastate rates on transportation of products of mines (R. 251, 432).

Competition among shippers and their customers was affected by the disparity between intrastate and interstate rates. Out-of-state shippers whose consignments to Utah customers move at interstate rates compete with Utah shippers whose shipments to Utah customers move at lower intrastate rates (R. 253, 265–

267, 276, 278). In order to permit interstate traffic to compete with intrastate, the *Ex parte 175* increase was removed from some interstate rates (R. 266). Interstate rates on uranium and vanadium were reduced on hauls from Thompson, Utah, to Nada, Colorado, because of the lower intrastate rates on competing traffic between Green River, Utah, and Kalunite, Utah (R. 262). For the same reason, interstate increases were removed from rates on bituminous coal (R. 251-252), and they were removed on coking coal "to enable producers in Colorado to maintain a competitive position with Utah producers" (R. 253).

We submit that evidence of the foregoing nature and scope sufficiently supports a general finding as to the relationship between intrastate and interstate rates. "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory." *King* v. *United States*, 344 U. S. 254, 275. The Commission, having special knowledge and competence in the field of rate making and rate comparisons, may make its own appraisal of the facts disclosed by the evidence. Here, as in a question of transportation economics, "the Commission's judgment is entitled to great weight." *New York* v. *United States*, 331 U. S. 284, 328.

We deny appellants' statement (Br. 25) that cross-examination of the witness Watson developed that "in almost every instance" in which mileages were comparable intrastate rates were already higher than

the increased interstate rates, and their further statement (Br. 28) that the evidence submitted by this witness established that "by and large" existing intrastate rates were higher than comparable interstate rates. The only such instances developed were two intrastate rates on sheep and one on cattle (R. 202–205), which rates the Commission *excepted* from the increase in intrastate rates which it ordered (R. 119, 130).

Furthermore, the Commission did not in any *pro forma* manner require a blanket increase in intrastate rates. It excepted from its order intrastate rates which were shown to be "now as high as corresponding interstate rates" for comparable distances (R. 119). It also specified that no increased intrastate rates should exceed "the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad" (*ibid.*). Appellants state, without any record reference, that most of the traffic in the west moves on flat commodity rates not based upon mileage,[5] and call this limitation "an illusory protection" (Br. 28). Certainly a limitation which is defined and specific, and therefore readily applicable, is not illusory. In addition, the Commission made its findings and order without prejudice to the right to challenge, "upon complaint or otherwise", the lawfulness "of any individual Utah intrastate rate on any particular commodity" (R. 120). This saving clause, in substance the same as that included in the order approved in the *Wisconsin*

[5] We are aware of no evidence which supports this broad statement.

Railroad Commission case, 257 U. S. 563, 566, 591, permits any appropriate adjustment of individual intrastate rates. See also *King* v. *United States, supra,* p. 269, n. 13, and p. 276.

We also deny appellants' statement (Br. 27) that the Commission ignored the exhibits (68–73) introduced by the witness Manley, who appeared on behalf of one of the protestants to the proposed intrastate rate increase. The Commission considered and discussed facts disclosed by Exhibits 69–71 (R. 103).[7] It stated that comparison of Utah intrastate rates with intrastate rates in certain other states does not afford a basis for determining the lawfulness, under Section 13, of the Utah intrastate rates (*ibid.*). And in the three instances, as shown by the exhibits, of intrastate coal rates higher than corresponding interstate rates, the Commission *excluded* these rates from its rate increase order (R. 103, 119, 131).

C. THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT CONDITIONS INCIDENT TO UTAH INTRASTATE TRANSPORTATION ARE NOT MORE FAVORABLE THAN THOSE INCIDENT TO UTAH INTERSTATE TRANSPORTATION

Four railroads operate both in Utah and other states: the Union Pacific, the Denver & Rio Grande, the Southern Pacific, and the Western Pacific (R. 16–17).[8] Only two of these carriers, the Union Pacific

[7] Exhibit 68 (R. 729), which merely showed certain intrastate rates without any comparison with interstate rates, and Exhibits 72 and 73 (R. 733–734), which merely showed increases which had been made in certain interstate coal rates, were not of sufficient relevance to merit discussion.

[8] Five other railroads operate wholly within Utah: the Ogden Railway, the Bamberger Railroad, the Salt Lake, Garfield &

and the Denver & Rio Grande, haul any appreciable amount of intrastate traffic.[9]

The assistant superintendent of the Utah Division of the Union Pacific (R. 242) testified that on this railroad Utah interstate and intrastate traffic is handled by the same crews and same clerks, and hauled on the same trains, and that in all the trains interstate and intrastate traffic are intermingled (R. 244). He further testified that the only operating difference between interstate and intrastate movements was that work done in accumulating some intrastate traffic was not done for interstate traffic (R. 246). A vice president of the Denver & Rio Grande (R. 317) gave even more detailed testimony as to the complete identity, from an operating standpoint, of that railroad's interstate and intrastate Utah traffic (R. 318–319). He also testified that a considerable part of the D. & R. G.'s Utah intrastate traffic originated on its branch lines, and that its wage rates on some of its branch lines were higher than on its main line, and higher than on other railroads operating in Utah (R. 319–320).[10]

Proof that interstate and intrastate traffic move on the same trains and are handled in precisely the same manner is evidence of the most convincing character

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Western Railway, the Tooele Valley Railway, and the Utah Railway (R. 16–17).

[9] In 1953, the revenue from Utah intrastate traffic was: Union Pacific, $8,732,091; Denver & Rio Grande, $5,864,623; Southern Pacific, $109,592 (R. 165). As to the Western Pacific's relatively insignificant participation in Utah intrastate traffic, see Exhibit 7 (R. 452).

[10] Compensation to employees constitutes more than 60% of railroad operating expenses (R. 150).

that operating costs for intrastate freight transportation are not more favorable than for interstate transportation. The railroad's evidence therefore supported the Commission's finding to this effect unless other evidence required a contrary finding. Proof that precisely the same operations were performed whether the commodity transported was moving in interstate or intrastate commerce did not lose its evidentiary force, as appellants seem to imply (Br. 24), merely because the same thing may be true of railroad operations generally.

It is possible, although not probable, that, notwithstanding identity in the character of interstate and intrastate operations, there may exist special circumstances which affect intrastate transportation solely or primarily and bring about either higher or lower operating costs than for interstate transportation. Appellants and other protestants to an intrastate rate increase introduced evidence designed to show lower intrastate operating costs. Appellants' complaint necessarily must be, as we see it, not that there is no substantial evidence to support the Commission's finding, but that the Commission erred in failing to give controlling weight to the protestants' evidence. The evidence of this kind on which appellants rely (Br. 30–33) is: (1) as to the four railroads operating within and without Utah, greater traffic density on their Utah traffic than on their system-wide traffic; (2) for the same roads, a lower operating ratio for Utah traffic than system-wide; and (3) a high rate of return on investment in transportation property for

the Bamberger Railroad, which operates solely in Utah.

(1) The figures as to both traffic density and operating ratio are taken from Exhibit 64 (R. 548). Those which are labeled "intrastate" in fact include all traffic movements in Utah, whether interstate or intrastate, and therefore include all "bridge" traffic moving across the state with neither origin nor destination in Utah (R. 293). Such bridge traffic, if a relatively large part of what is labeled intrastate, might completely distort the so-called "intrastate" figures shown. It was the Commission's considered conclusion that the comparisons made in Exhibit 64 "are of little significance in our determination here" (R. 115).

The Commission also deemed the traffic density figures unreliable because they were based on main-line trackage and did not include branch-line trackage (R. 115).[11] In addition, appellants' own argument based on traffic density (ton-miles transported per mile of track) is, on the facts of this case, patently inconclusive. It rests on the reasoning that while direct operating costs vary with the amount of freight handled and the distance, fixed costs (such as general overhead and property taxes) do not change materially with the volume of freight handled and bear less heavily on each unit as the volume of freight goes up. But theoretical saving of the kind suggested is an insufficient basis for a determination that operating costs in intrastate commerce are lower than in interstate commerce,

[11] Branch-line trackage in Utah may well have been a considerably higher percentage of total trackage than its percentage of total trackage system-wide.

to a degree which is significant in a Section 13 (4) proceeding, absent any evidence permitting even an educated guess as to the amount of the extra contribution to fixed costs resulting from greater traffic density. Here there was no such evidence.

(2) As to the evidence designed to show more favorable operating ratios in Utah than system-wide; the Commission stated, as it had declared earlier in *Cham. of Comm., Kansas City* v. *Atchison, T. & S. F. Ry. Co.*, 164 I. C. C. 302, 308, that "the method of allocating revenues and expenses to a particular State was open to so many serious objections that the results obtained were unreliable" (R. 116).[12]

(3) The Commission considered and rejected the contention that the high rate of return on net investment in 1953 of the Bamberger Railroad showed that the railroads operating in Utah do not need an increase in Utah intrastate rates. The Commission pointed out that since September 1952 this railroad has had only 37 miles of main-line track (R. 99). The Commission said (R. 100):

> The Bamberger has no passenger operations, and it is the only railroad serving Hill Air Force Base. The seeming prosperity of the Bamberger does not prove that the other lines

[12] The Utah revenues and expenses shown in Exhibit 64 were taken from annual reports which the railroads were required to file with the Utah Public Service Commission (R. 287–288). The Union Pacific reports stated that revenue and expenses in Utah reflected the formula for apportionment prescribed by the Utah Commission, and that the prescribed formula "does not in fact * * * reflect the actual cost of operation in the State of Utah" (R. 295).

> operating in Utah do not require additional revenue.

As countless Commission studies attest, it has been the unvarying experience of American rail carriers, for many years, that freight traffic is more productive than passenger traffic. For a review of this history, see *King* v. *United States*, *supra*, pp. 260–267.

Moreover, if the Bamberger's rate of return is of any significance, so is that of the Utah Railroad, which also operates only within Utah. That railroad had a 1953 rate of return of less than 1% (R. 364).

Appellants state (Br. 35):

> The basic Utah intrastate rates were established many years ago when Utah's economy was largely agricultural and when traffic density was low. High rates therefore had to be imposed to compensate for the low density. Succeeding horizontal percentage increases down through *Ex Parte No. 168* tended further to distort the difference rather than to bring Utah rates down into line with interstate rates.

There is no evidence that the Utah intrastate rates to which the *Ex parte 162*, *166* and *168* increases were applied were the intrastate rates "established many years ago," or that such intrastate rates were "[h]igh rates." The statements quoted above, being without evidentiary support, must be disregarded.

We submit, in sum, that there was convincing affirmative evidence that conditions bearing on the carriage of Utah intrastate traffic are not more favorable than conditions affecting the movement, within Utah, of interstate traffic, and that protestants' efforts to overcome this evidence were weak and unpersuasive.

Certainly, it cannot be said in this case that the expert agency's evaluation of the facts was arbitrary. In substance, petitioners are simply seeking to have the reviewing court weigh the evidence *de novo*, reach a judgment, and substitute that judgment for the Commission's. That is not the reviewing court's function.

II

IN THE PRESENT SECTION 13 (4) PROCEEDING, APPELLANTS MAY NOT COLLATERALLY ATTACK THE VALIDITY OF THE INTERSTATE RATE INCREASES AUTHORIZED BY THE COMMISSION IN THE *EX PARTE 175* PROCEEDING

Appellants contend (Br. 36–41) that the flat percentage increase authorized for the majority of interstate rates in th *Ex parte 175* proceeding was unlawful. Their subsidiary contention is that an order increasing intrastate rates in order to remove unjust discrimination against interstate commerce is invalid if the discrimination results from higher interstate rates established pursuant to an order of the Commission which itself is invalid. The correctness of the subsidiary contention need not be considered because, as the court below held (R. 48), the rule that orders of the Interstate Commerce Commission may not be collaterally attacked bars the appellants from raising the question of the validity of the *Ex parte 175* order.

Appellants concede that orders of the Commission are not open to collateral attack, but they contend that, since they are not "attempting to set aside the interstate increases as authorized in *Ex parte 175*", they are not collaterally attacking the validity of the order entered in that proceeding (Br. 36–37).

Certainly, however, the attack on that order, being made in a separate and independent proceeding, is collateral and, no less plainly, appellants are requesting a judicial determination that the order is invalid. Absence of a prayer that the attacked order be set aside does not take a case out of the rule against collateral attack—the very fact that the attack is collateral prevents grant of this relief. Cf. *Callaway Road Co.* v. *United States*, 345 U. S. 507, 512; *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 143.

Furthermore, appellants' attack upon the *Ex parte 175* order is wholly without merit. Appellants did not introduce the *Ex parte 175* record in the present proceeding, and there is therefore no foundation for appellants' contention (Br. 37) that in the *Ex parte 175* proceeding the Commission did not require evidence that the railroads were efficiently managed. See *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286.

Appellants make the curious contention (Br. 38) that, since long-haul charges are higher than short-haul charges, the flat percentage increase authorized in *Ex parte 175* results in larger dollar and cents increases for long-haul shippers than for short-haul shippers, and appellants imply that this increase was therefore unduly preferential to short-haul shippers and unduly prejudicial to long-haul shippers. The dollar charge paid by long-haul shippers is, of course, greater than the dollar charge paid by short-haul shippers because the former are rendered more transportation service by reason of the greater distances

their property is transported. When both long-haul charges and short-haul charges are increased by the same percentage, the rate relationship of the two types of shippers is left unchanged. Plainly there is not thereby created either undue preference or undue prejudice.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1957.

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[18] On a per ton-mile basis; the long-haul shipper's charge is generally lower than the short-haul shipper's charge (R. 116).

APPENDIX

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, provides in part as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation, subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [49 U. S. C. preceding Sec. 1.]

* * * * * *

Sec. 13. (3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the car-

rier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III. [49 U. S. C. 13 (3).]

Sec. 13. (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge,

minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. [49 U. S. C. 13 (4).]

* * * * * *

SEC. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. [49 U. S. C. 15a (2).]